

EXHIBIT Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUZANNA BOWLING,)
Individually and on)
behalf of all others)
similarly situated,)

Plaintiff,)

vs.)

JOHNSON & JOHNSON and)
McNEIL NUTRITIONALS, LLC,)

Defendants.)

-----)

No.

1:17-cv-03982-AJN

November 9, 2018

10:02 a.m.

Deposition of DENISE N. MARTIN, held at
the offices of Bursor & Fisher, P.A., 888
Seventh Avenue, New York, New York, before
Laurie A. Collins, a Registered Professional
Reporter and Notary Public of the State of New
York.

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10:33:57

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10:34:14

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10:34:53

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10:35:00

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So that -- what I glean from that is I
wouldn't expect on average that consumers were
paying attention to that label particularly.

And then I looked at what happened when
the claims were removed from the label in 2012,

Again, that's another thing that would lead me to
believe that consumers don't have much of an
impression at all about the no trans fat claim on
this product.

Q. Did you also review the report of
Dr. Dennis in this case?

A. Yes.

Q. You did do that; right?

A. Yes.

Q. And did you see that he did a survey

1 where he asked consumers what their understanding
2 of the no trans fat claim is? Did you see that?

3 A. I did see that.

4 Q. You didn't mention that in your answer,
5 though -- right? -- about what you did to 10:35:18
6 determine, if anything, to understand how
7 consumers interpret the no trans fat claim; right?

8 A. I thought you were asking me what I
9 personally did, my personal investigation, and I
10 did review Dr. Dennis's work in this matter. 10:35:38
11 Really I focused my review of him on his conjoint
12 analysis rather than his materiality study,
13 although I understand that since then Dr. Scott
14 has submitted a materiality analysis that refutes
15 the findings of Dr. Dennis's. 10:36:00

16 Q. Okay.

17 So as part of your work, did you do
18 anything -- well, strike that.

19 Did you interview any consumers to
20 understand how they understood the no trans fat 10:36:18
21 claim in this case as part of your work in this
22 case?

23 A. I didn't personally conduct interviews,
24 though I did look at transcripts of interviews
25 that were included in the McNeil documents that I 10:36:31

1 reviewed where they asked consumers about a number
2 of things that actually did not include
3 trans fats. They asked them a lot about their
4 understanding of plant stanol esters and the
5 cholesterol-lowering benefits of Benecol. 10:36:51

6 And my takeaway from that, in
7 conjunction with other findings, is that this is
8 not -- this is not the reason that consumers are
9 buying Benecol. It's not a point of
10 differentiation, [REDACTED] in 10:37:08
11 consumers' minds particularly.

12 Q. So you never spoke to a single Benecol
13 consumer directly as part of your work in this
14 case; right?

15 A. And I would give the same answer, which 10:37:27
16 is I haven't personally conducted interviews.
17 But, as I do routinely, I'm relying on the
18 company's own internal documents and surveys that
19 it conducted.

20 Again, I think since then I'm also 10:37:43
21 relying on -- or I think would add to my reliance
22 the work of Dr. Scott, because she does ask those
23 questions very directly. And what she finds is
24 very consistent, it's very supportive of the
25 conclusions that I reached here. 10:38:02

1 about.

2 Q. Did you personally speak with any
3 McNeil or Johnson & Johnson executives as part of
4 your work in this case?

5 A. I did not. 10:48:40

6 Q. So you never asked any of the McNeil or
7 Johnson & Johnson executives why the no trans fat
8 claim was placed on each Benecol package five
9 times; right?

10 MS. CHANOINE: Objection, form. 10:49:02

11 A. Again, the way you're stating that
12 question, it makes it sound like the consumers
13 would see the label five times --

14 Q. I'm just asking you if you've asked
15 someone that.

16 A. -- when they looked at the package.

17 MS. CHANOINE: Counsel, please let --

18 Q. I'm not talking about what people have
19 sounded or anything like that. I just want to
20 know did you ever ask -- did you ever ask one of 10:49:20
21 the executives at McNeil or Johnson & Johnson why
22 the no trans fat claim was put on each package of
23 Benecol five times.

24 Did you ask them that or not?

25 MS. CHANOINE: Objection, form, asked 10:49:33

1 reviewed.

2 Q. Do you think it's fair, however, to
3 consider the results of Dr. Dennis's consumer
4 perception survey when determining what consumers
5 understood the no trans fat claim to mean? 11:25:08

6 MS. CHANOINE: Objection, form.

7 A. Again, I'm not here to respond to
8 Dr. Dennis's perception survey particularly. I
9 know that Dr. Reibstein, you know, did respond to
10 that and finds it to be infirm. I -- that makes 11:25:21
11 sense to me. Just in the face of everything else
12 I reviewed, it makes sense that was not reliable
13 by done. It's inconsistent with the other
14 evidence that I've reviewed.

15 Q. So what basis do you have to agree with 11:25:53
16 Dr. Reibstein's opinion that Dr. Dennis's consumer
17 perception survey wasn't reliably done?

18 A. That, again -- I'm not opining about
19 the reliability or not of Dr. Dennis's survey. I
20 leave that to Dr. Reibstein. However, his 11:26:25
21 conclusion that it's not reliable is consistent
22 with the other information that I reviewed in the
23 sense that he finds it is -- he finds it is
24 material to consumers -- the label is material to
25 consumers, in fact then measured it as a 20, you 11:26:47

1 something Health Balance.

2 Q. As part of your work in this case, did
3 you do anything to attempt to calculate a price
4 premium solely attributable to the no trans fat
5 claim on the Benecol packaging? 11:31:47

6 A. I didn't do a fulsome estimation of
7 that. I did review the estimate put forward by
8 Mr. Weir and am of the opinion that it's
9 completely inflated. All the evidence that I have
10 reviewed indicates that it's inconsistent with a 11:32:18
11 price premium of that magnitude and is consistent,
12 honestly, with the price premium of potentially
13 zero.

14 Q. Other than the calculation that
15 Mr. Weir performed of the price premium solely 11:32:43
16 attributed to the no trans fat claim, have you
17 seen any other evidence of price premium
18 calculations in this case concerning the no
19 trans fat claim?

20 MS. CHANOINE: Objection, form. 11:33:08

21 A. I disagree with the foundation of that
22 question, which is that Mr. Weir has put forward
23 an estimate of the price premium associated with
24 the challenged claims. He just hasn't.

25 It's -- the tool that Dr. Dennis is 11:33:27

1 price premium calculation in this case; right?

2 MS. CHANOINE: Objection, form.

3 A. I would give exactly the same answer
4 that I just gave.

5 Q. Okay. 11:34:55

6 Is a calculation of the price drop for
7 the Benecol spread products the same thing as a
8 calculation for the price premium solely
9 attributed to the no trans fat claim, if any?

10 MS. CHANOINE: Objection, form, 11:35:21
11 incomplete hypothetical.

12 A. No, I believe additional work would
13 need to be done to assess whether any of that
14 observed change in price is attributable to the
15 label change. And I'm really not using it for 11:35:39
16 that -- well, I am using it for that purpose, but
17 it's primarily to impeach Mr. Weir; right?

18 He has this real-world market data
19 that's flatly inconsistent with the results that
20 he's picking up and multiplying from Dr. Dennis. 11:35:55
21 And he has no explanation for the difference;
22 right? I have an explanation: He's got the wrong
23 tool, you know, he's got a biased survey, his
24 numbers are just -- are just inflated.

25 Q. What did you mean when you just used 11:36:18

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Q. Okay.

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(Pause.)

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Q. As part of your work here, did you do 11:42:25

11

anything to determine whether the price of Benecol

12

with the no trans fat claim on the label would

13

have been higher than the price of Benecol without

14

that claim being on the label, holding everything

15

else equal? 11:42:43

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MS. CHANOINE: Objection, form.

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A. And I believe I testified earlier that

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I have not done sort of a fulsome analysis of

19

that. I've done enough to know that Dr. --

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Mr. Weir's use of 20 percent from Dr. Dennis is 11:43:01

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speculative, unreliable, flawed, wrong, and that

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what evidence we do have suggests if anything it

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would be a small fraction of that and may be zero.

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Q. So do you believe that there is

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evidence suggesting that there may be some 11:43:30

1 A. No, I don't believe so.

2 Q. In order to draft this report in the
3 Bowling case, did you start with your report in
4 the Martinelli case and then save a new document
5 and revise that report to create this one? 01:13:14

6 MS. CHANOINE: Objection, form.

7 A. I certainly used some of the same
8 language from the Martinelli report. I don't
9 remember whether I just sort of cut and pasted
10 certain sections from that document or if I 01:13:32
11 started from that document and saved it as a new
12 document. I think the latter -- the former,
13 sorry, but...

14 Q. What was your assignment in this case?

15 A. I was asked to review the damages 01:14:02
16 analysis and methodology proposed by Mr. Weir, who
17 in turn relies on the conjoint analysis done by
18 Dr. Dennis, and to reach an opinion about whether
19 I believed that was a reliable estimate of class-
20 wide damages. 01:14:31

21 Q. Anything else?

22 A. I think that's the overarching
23 assignment. And then along the way I went through
24 a number of steps to reach the conclusions that I
25 did. 01:14:56

1 Q. Could you please turn to page 3 of your
2 report. Do you have that?

3 A. Yes.

4 Q. Can you just take a moment to read to
5 yourself paragraph little A on page 3 and let me 01:15:25
6 know when you're done?

7 A. Okay.

8 (Pause.)

9 Q. Do you see four sentences into that
10 paragraph there's a sentence that states, Economic 01:16:21
11 theory and evidence, however, are clear that
12 market prices are determined by the interaction of
13 both demand side and supply side factors?

14 Do you see that?

15 A. Yes. 01:16:38

16 Q. Did you write that sentence?

17 A. Yes.

18 Q. Do you still agree that market prices
19 are determined by the interaction of both demand
20 side and supply side factors? 01:16:50

21 A. Yes.

22 Q. What is a supply side factor?

23 A. Any factor that affects the amount of
24 product or the price at which a company is willing
25 to sell that product for. 01:17:15

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1 Q. So would marketing expenses be a supply
2 side factor?

3 A. Yes.

4 Q. Would transportation costs to get a
5 good to market be a supply side factor? 01:17:43

6 A. Sure, could be.

7 Q. Would costs of production be supply
8 side factors?

9 A. Yes.

10 Q. How about research and development 01:17:54
11 costs?

12 A. Can be, yes.

13 Q. Later on in that paragraph you write a
14 phrase "the 'but for' world." Do you see that?

15 A. Yes. 01:18:28

16 Q. What is the "but for" world in the
17 context of this case?

18 MS. CHANOINE: Objection to form.

19 A. One in which the challenged labels did
20 not appear on the Benecol products. 01:18:51

21 Q. Is the "but for" world a hypothetical
22 place?

23 MS. CHANOINE: Objection, form.

24 A. I think that's probably a fair way to
25 describe it. It's -- my understanding is that 01:19:18

1 of the Benecol brand name?

2 MS. CHANOINE: Objection to form.

3 A. [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

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[REDACTED]

01:27:53

1 with the Benecol spreads -- that used the claim no
2 trans fat on their product label?

3 A. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 Q. You think that Promise Activ wrote the
13 word "no trans fat" on the label of their product
14 at some point in time? Is that your testimony?

15 A. I believe one of the two -- and I don't 01:32:16
16 remember which it was -- added the "no
17 trans fat" -- yes, the words "no trans fat" to its
18 label.

19 Q. And what's your basis for believing
20 that? 01:32:26

21 A. Seeing labels later on, maybe looking
22 today. I can't remember. Just that's my
23 recollection sitting here.

24 Q. You looked at something today that you
25 can't remember? 01:32:38

1 Q. Did you make any allowance for or did
2 you consider the results of Dr. Dennis's surveys
3 in the evidence that you reviewed?

4 MS. CHANOINE: Objection to form.

5 A. I considered them and found his 01:34:34
6 conjoint survey to be badly flawed and his
7 materiality survey to be inconsistent with the
8 other evidence that I reviewed, and now understand
9 that Dr. Scott has done a different materiality
10 survey and found that the label is not material to 01:34:51
11 consumers' purchase decisions.

12 Q. But although your understanding is that
13 the results of Dr. Dennis's consumer perception
14 survey is inconsistent with other evidence in the
15 case, do you still make allowance for the results 01:35:10
16 of that survey when you form your opinions?

17 MS. CHANOINE: Objection, form.

18 A. I certainly -- again, I'm not opining
19 about his materiality survey. I leave that to
20 Dr. Reibstein. But I am opining that -- I 01:35:25
21 certainly considered that, and I am opining that
22 it's inconsistent with the sum and substance of
23 the other data I reviewed.

24 So it makes sense that Dr. Reibstein
25 has critiques of that and that the survey that Dr. 01:35:47

1 removal of the challenged labeling. I believe to
2 do that would be a much more complicated exercise.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

[REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Q. But we already established you did not
10 do the more fulsome analysis; right?

01:56:39

11 A. I did not, because I did not need to do
12 so to render the opinions that I gave and am
13 giving here, which are the 20.8 percent just
14 cannot be reliable [REDACTED]

15 [REDACTED]

[REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Q. But you didn't do it; right?

19 MS. CHANOINE: Objection, asked and

20 answered.

01:57:07

21 A. I can give the same answer. I will if
22 you like me to. I've done enough to know that the
23 20.8 percent is not possible -- there's no way
24 that's a reliable estimate; it's grossly
25 inflated -- [REDACTED]

01:57:18

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A. That's right.

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Q. Do you have any opinion in this case

25

that the percentage in the national retail --

02:03:17

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But if some portion of it is
attributable to the label, that means there would
be some people -- yes, there are some people that, 02:28:38
you know, would not have purchased absent the
challenged labeling.

And so no one paid a price premium, but
there'd be some people who, if liability is found,
would be entitled to a refund. That's not the 02:28:50

Q. Would you have been able to determine whether there was a price premium attributable to the no trans fat claim solely from the retail sales data you reviewed for the Benecol spreads in this case?

02:30:53

A. I'm sorry, can you be more specific about what you're asking, would I have been able to...

Q. Determine whether there was a price premium attributable to the no trans fat claim solely from looking at the retail sales data you reviewed for the Benecol spreads in this case.

02:31:09

A. Okay. So if I had been asked to do this more fulsome analysis that I referenced earlier in the deposition, which, again, I don't believe -- I don't -- I did not need to do the render the opinions I have offered here. But if I was asked to do that, I would need additional information other than just the retail sales data that has been provided here.

02:31:25

02:31:41

Q. I want to go down to paragraph 9 in your report. Do you have that?

A. Yes.

Q. Can you just read that to yourself, and let me know when you're ready to continue.

02:32:04

1 defendants, not by the plaintiffs or defendants
2 themselves.

3 Q. Okay.

4 A. And in my experience at NERA, I have
5 been retained more often by counsel for 02:39:37
6 defendants.

7 Q. What's your best estimate in terms of a
8 percentage split, were you retained by counsel for
9 defendants versus counsel for plaintiffs in your
10 work at NERA? 02:40:03

11 A. Certainly the majority has been for on
12 behalf of counsel for defendants. I'm not sure I
13 can put a number on it, but it would be probably
14 the large majority.

15 Q. Okay. 02:40:22
16 Like how large? 75 percent?

17 A. Yes.

18 Q. More than 75 percent?

19 A. Maybe.

20 Q. More than 90 percent? 02:40:29

21 A. No.

22 Q. Somewhere between 75 percent and 90
23 percent of the time?

24 A. That sounds right.

25 Q. Retained by counsel for defendants? 02:40:36

1 tracked that, not to my knowledge.

2 Q. Do you think it's good idea to put
3 stuff like that on NERA's Web site?

4 A. I guess a good idea for what?

5 Personally I don't -- 02:46:01

6 Q. For anything. Do you think it has any
7 merit to post?

8 MS. CHANOINE: Objection to form.

9 A. I would say I get asked about -- every
10 time I've been asked about it, it's always been in 02:46:13
11 a deposition by opposing counsel. So in that
12 sense I have not found it particularly helpful.
13 Again, I haven't studied any other effects.

14 Q. Do you have page 11 of your report? Do
15 you still have that? 02:46:49

16 A. Yes.

17 Q. Do you see in paragraph 20 at the
18 bottom there's subparagraph C? Do you see that?
19 It says, Market prices are determined by the
20 interaction of these demand and supply processes. 02:47:00

21 Do you see that?

22 A. Yes.

23 Q. You're talking about actual market
24 prices there; right?

25 A. Yes. 02:47:08

1 Q. And if we turn the page, there's
2 paragraph 21 at the top; right?

3 A. Yes.

4 Q. Paragraph 21 says, Because these
5 accepted principles of microeconomics explain that 02:47:25
6 market prices are determined by the interaction of
7 the forces of supply and demand, both supply side
8 and demand side forces must be incorporated into
9 any attempt to estimate a market-based price
10 premium. 02:47:43

11 Do you see that?

12 A. Yes.

13 Q. What do you mean by the word
14 "incorporated" in that sentence?

15 A. Taken into account, factored in. 02:47:48

16 Q. Is it fair to say that Dr. Dennis
17 factored in information about supply side
18 considerations into his conjoint survey by using
19 actual market prices for Benecol in the survey
20 design? 02:48:10

21 A. No, not in the way that's necessary to
22 have the results of that analysis be a price
23 premium.

24 Q. What do you mean by that?

25 A. That conjoint survey is a tool that 02:48:37

1 4.80 price is used as a benchmark in his -- in the
2 simulation, and everything else that feeds into
3 that simulation is the results from the consumers'
4 responses.

5 And further I know that even that 02:57:47
6 demand side simulation only works in a certain
7 range of prices. I understand that it doesn't
8 work if you get below \$4.10. So even as a demand
9 side tool it's not telling us the full -- any kind
10 of full story. 02:58:06

11 Q. Can you please turn to page 13 of your
12 report? Do you have that?

13 A. I do.

14 Q. Okay.

15 Do you see the third sentence down 02:58:19
16 where it says, The historical sales and prices of
17 the products reflect the outcome of particular
18 demand and supply decisions given the specific
19 circumstances that existed at that time?

20 Do you see that? 02:58:40

21 A. Yes.

22 Q. And did you write that?

23 A. I did.

24 Q. Do you still agree that historical
25 sales and prices of Benecol reflect the outcome of 02:58:53

1 demand and supply decisions given circumstances
2 that existed in the actual market?

3 MS. CHANOINE: Objection to the extent
4 it doesn't actually reflect the wording of the
5 document. 02:59:27

6 A. Yeah, you left out -- you left out a
7 couple of words. But I am still of the opinion
8 that historical sales and prices of products
9 reflect the outcome of a particular demand -- of
10 particular demand and supply decisions given the 02:59:42
11 specific circumstances that existed at that time.

12 Q. And when I'm talking about
13 circumstances and points in time, you're talking
14 about circumstances and points in time in the
15 actual marketplace, in the real world; right? 02:59:58

16 A. Yes. And I guess --

17 Q. Not a hypothetical world; right?

18 A. What Mr. -- Dr. Dennis and Mr. Weir are
19 doing is a hypothetical world; right? They are
20 saying what if consumer demand or consumer 03:00:17
21 willingness to pay were to be reduced by 20
22 percent.

23 Again, I don't think that's a realistic
24 number for all sorts of reason. But that's a
25 hypothetical. What would hypothetically happen to 03:00:33

1 action case to proffer a class-wide damages
2 methodology?

3 A. I think I responded earlier that, yes,
4 I have been retained by plaintiffs' counsel in
5 class actions. I have done work on those matters. 03:36:45
6 I have not had -- they settled before it came to
7 testimony, so I haven't -- I think you used the
8 word "proffer." I haven't proffered testimony in
9 those.

10 Q. Okay. But you've been retained by 03:37:04
11 counsel for plaintiffs in class action lawsuits,
12 and as part of those retentions you were, you
13 know -- you created a report that set forth a
14 class-wide damages model. That's what I'm asking,
15 have you done that, have you ever done that. 03:37:28

16 A. I've certainly done analysis. I don't
17 believe it's come to -- I don't believe it's come
18 to the point where I've had to submit a report.
19 Those cases have settled before testimony was
20 required, either live or in written form. I may 03:37:48
21 have created a draft, but I have not actually
22 submitted written testimony or given oral
23 testimony in those cases.

24 Q. Okay. So you've never submitted a
25 report to a court where you were an expert for 03:38:02

1 plaintiffs in a class action where you set forth a
2 damages framework for a putative class; is that
3 right?

4 A. Yes, that's right.

5 (Pause.)

03:39:24

6 MR. MARCHESE: I don't have any further
7 questions. Thank you.

8 EXAMINATION BY

9 MS. CHANOINE:

10 Q. I just have one to go into.

03:39:32

11 Dr. Martin, do you recall Mr. Marchese
12 asking you about how you went about drafting the
13 report you submitted in this case?

14 A. Yes.

15 Q. Do you recall him asking the role of
16 the Martinelli report when you drafted the report
17 in this case?

03:39:51

18 A. Yes.

19 Q. At one point you testified about the
20 phrase "cutting and pasting." Do you remember
21 testifying to that?

03:40:11

22 A. Yes, I do.

23 Q. Can you explain what you meant by that?

24 A. There are obviously certain
25 commonalities in this case and in the Martinelli

03:40:23